

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18-01-2005

Coram;

The Honourable Mr. Justice V.KANAGARAJ

CRL.O.P.No.33979 of 2004

&

CrI.M.P.No.10670 of 2004

M.Seethalakshmi ... Petitioner/Accused-2

Vs.

Suresh Bafna
Proprietor,
Mansi Mercantile Co.
rep. by his power of Attorney
G.Narasimhalu,
s/o Sri G.N.Chetty,
No.22,Mulla Saheb Street,
Sowcarpet, Chennai-79. ... Respondents/Complainant

This CrI. Original petition is filed under Section 482 of Code of Criminal Procedure, as stated therein.

For Petitioner: Mr.N. Mohideen Basha
For Respondent: No appearance

Order

This Criminal Original Petition has been filed praying to call for the records in C.C.No.4099 of 2001 on the file of VIII Metropolitan Magistrate, George Town, Chennai and quash the proceedings against the petitioner.

2. On a perusal of the materials placed on record and upon hearing the learned counsel for the petitioner, it comes to be seen that the petitioner/accused No.2 was charged for the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter called as the 'Act') on allegation that she stood as a guarantor, for the loan of Rs.10,00,000/- obtained by her husband/main accused from the complainant and only with her connivance and consent, the cheque bearing No.757486 dated 2-6-2001 for Rs.10,00,000/- has been issued by the main accused for the discharge of the said liability; that

the petitioner has come forward to file the above criminal original petition on ground that the main accused only issued the cheque in his individual capacity, therefore, unnecessarily, the petitioner cannot be roped in as an accused and when she is only a guarantor for the loan amount, the complaint against the petitioner on charge of consent and connivance is not at all maintainable and hence would seek the relief extracted supra.

3. When the above criminal original petition was taken up for consideration, no representation has been made on the part of the respondent. On the other hand the learned counsel for the petitioner besides reiterating the facts and circumstances pleaded in the above criminal original petition, would also cite two decisions, the first one rendered by the Andhra Pradesh High Court in G.SURYA PRABHAVATHI Vs. NEKKANTI SUBRAMANYESWARA RAO & ANOTHER (1998 (3) Crimes 543) and the second one rendered by this Court reported in GUMMADI INDUSTRIES LTD., & ANOTHER Vs. KHUSHROO F. ENGINEER (2000 (1) Crimes 1) both rendered by the learned single Judges respectively.

4. So far as the first judgement cited above is concerned in a proceeding under Section 138 of the Negotiable Instruments Act, 1881, on a criminal petition filed before the said High Court, wherein among the three accused who are the members of the joint Hindu family, first accused as the Manager of the joint Hindu family, third accused is his wife and all the three accused joining hands with each other, have approached the complainant and obtained the financial assistance for a sum of Rs.1,50,000/- for the purchase of the car and in the said transaction, the first accused had issued a cheque dated 1.2.1995 for a sum of Rs.2,56,300/- and on presentment since for want of sufficient funds in the accounts the cheque got dishonoured, criminal proceedings were initiated under Section 138 of the said Act against all the three accused and the learned single Judge of the Andhra Pradesh High Court having assessed the facts and circumstances of the case and analysing the import of Section 138 of the said Act and remarking that 'where the cheque has been drawn by a person on an account maintained by him with a banker for payment of money to another person from out of that account, for the discharge, in whole or in part, of any debt or other liability, was returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid, only such person shall be deemed guilty of the commission of the offence subject to the other conditions mentioned in proviso to the said Section and if the person committing the offence under Section 138 of the Act is

a company, then the person incharge of the company etc., as well as the company shall be deemed guilty of the offence as provided under Section 141 of the Act.

5. The learned Judge would further find that the emphasis is on the words "such person" and it is manifest from the expression of the words used in Section 138 of the Act. "Such person shall be deemed to have committed the offence" relate to the person who has drawn the cheque in favour of the payee and if the cheque is returned unpaid ... such person alone is liable but not the other except the contingencies mentioned under Section 141 of the Act.' With the above remarks, the proceeding initiated against the other two accused in the said case has been quashed by the learned single Judge.

6. In the second judgement cited above, the learned single Judge of this Court on the same subject would hold that " it is noticed that the second petitioner alone is the drawer as he has signed the cheque in his individual capacity and not as a Promoter of the first accused company.

1.Though the cheques were issued by the second petitioner towards the discharge of the liability of the first petitioner, the first petitioner company cannot be prosecuted as it is not the drawer. Therefore the proceedings as against the first petitioner are liable to be quashed and accordingly the same are quashed."

7. Since no appearance has been made on the part of the respondent, this Court is left with no choice but to decide the matter, after hearing the learned counsel for the petitioner and having regard to the materials placed on record in which event, what this Court is able to assess is that the complainant in the above case has initiated the proceeding under Section 138 of the Act on account of the returned cheque issued by the husband of the petitioner for the debt or liability alleged to have incurred by him by obtaining a loan of Rs.10 lakhs to which the petitioner stood as guarantor and in addition to the guarantee obtained from the petitioner he had also obtained a cheque dated 2.6.2001 for the said sum from the husband of the petitioner, who obtained the loan and on account of the said cheque having been dishonoured for the reason that the petitioner stood the guarantor which instead of approaching the civil court to enforce the guarantee, the complainant made the petitioner also an accused in the case registered in C.C.No.4099 of 2001 on the file of the VIII Metropolitan Magistrate, George Town, Chennai for the commission of an offence under Section 138 of the Act and only seeking to quash the said proceedings as against the petitioner, she has come forward to file the above Criminal Original Petition on averments extracted supra.

8. Not only from the construction of the provision of law under Section 138 of the Act, but also from the propositions held by the Upper Forums, two of which were cited above, particularly the first case cited above wherein the learned single Judge of the Andhra Pradesh High Court has clearly held that "under any pretext, no person other than one who has issued the cheque can be made an accused for the commission of the offence under Section 138 of the said Act, thereby quashing the proceedings against the petitioner therein and since in the case in hand also similar facts and circumstances prevail, the same decision could be arrived at in the present case also.

9. For the cheque issued by the husband for the loan obtained by him, just for the reason that in the borrowing of the loan a guarantee has been given by the wife, the petitioner herein, which could only be enforced in a Civil Forum for the liability and since the petitioner is not a party to the issuance of the cheque, she cannot be made a party or an accused for the prosecution of the bounced cheque under Section 138 of the Act and hence this Court is of the considered view that the case registered as against the petitioner in C.C.No.4099 of 2001 on the file of the VIII Metropolitan Magistrate, George Town, Chennai only becomes liable to be quashed and hence the following order.

In result,

(i) The above Criminal O.P. succeeds and is allowed.

(ii) The case registered against the petitioner in C.C.No.4099 of 2001 on the file of the VIII Metropolitan Magistrate, George Town, Chennai is hereby quashed so far as the petitioner is concerned;

(iii) Consequently, connected CrI.M.P.No. 10670 of 2004 is closed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

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Copy to:

1.The VIII Metropolitan Magistrate,
George Town,
Chennai.

2.-do- Thro The Chief Metropolitan Magistrate
Egmore, Chennai.

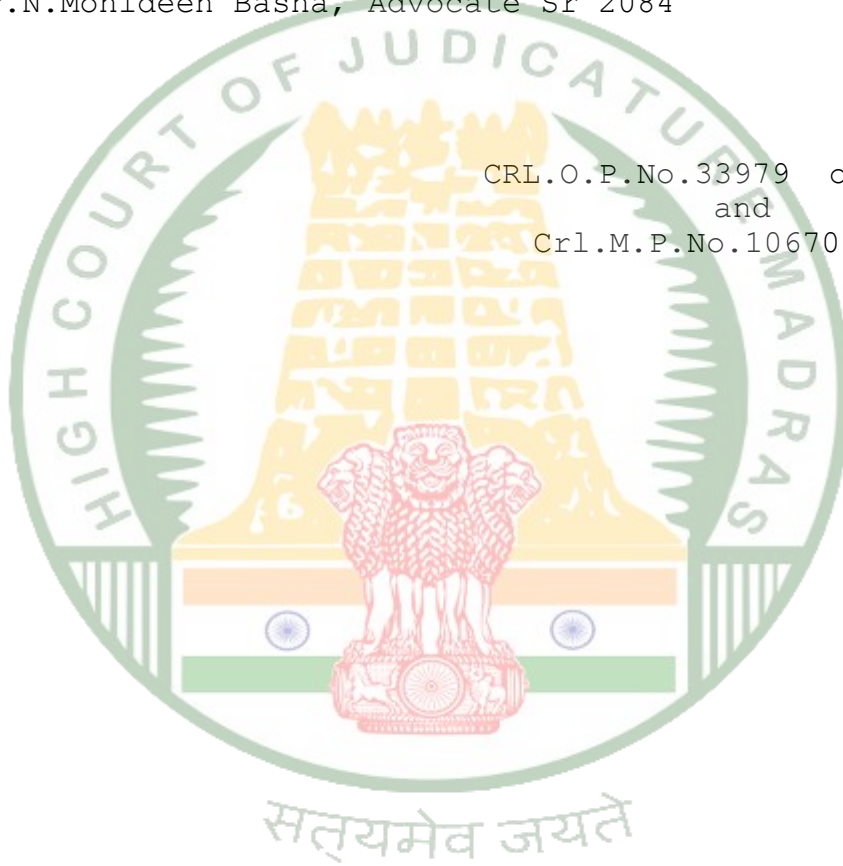
+1cc to Mr.N.Mohideen Basha, Advocate Sr 2084

KSJ (CO)
km/24.1.

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and

CrI.M.P.No.10670 of 2004



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